Taxation of Housing Reimbursement and Per Diem for TDY Assignments Over One Year and New Jersey Tax Liability for Working in New Jersey

The purpose of this article is to inform AMC personnel (military and civilian) on the tax impact (federal and state) of TDY assignments over one year and discuss the issue of whether or not the lodging and per diem reimbursements received or receivable by military and civilian personnel on TDY assignments over one year is taxable as income.

Military and civilian personnel are, from time to time, ordered to long term TDY (more than one year) at sites remote from their primary residence. They receive reimbursement for their actual housing expense and per diem at the local rate for meals for these extended periods. Questions arose about the tax impact of the amounts described above upon review of the Joint Travel Regulation (JTR), which remarks (without citation) that these amounts are taxable income.

The JTR reads at paragraph FC4430-F2: "[a] TDY assignment at one location for more than one year is considered, by the IRS, to be permanent and any reimbursement is taxable income." Considering the following analysis, this office sent a clarification request to the General Services Administration on May 1, 2001, because (1) the paragraph did not contain citations to authority for this position and (2) that position was at odds with research into the United States Code and IRS regulation(s), commonly accepted tax guidance, several information requests to the IRS, and the opinion of the Office of The Judge Advocate General (LTC Curtis Parker). No response has been received to date. If the examination below is insufficient, we may, of course, request a private opinion from the Internal Revenue Service or the New Jersey Attorney General's Office.

The law in three situations is set forth below.

1. Military Personnel:

26 U.S.C. § 134 (2001), *Certain military benefits*, reads as follows:

(a) General rule. Gross income shall not include any qualified military benefit.

(b) Qualified military benefit. For purposes of this section--

(1) In general. The term "qualified military benefit" means any allowance or in-kind benefit (other than personal use of a vehicle) which--

(A) is received by any member or former member of the uniformed services of the United States . . . and

(B) was excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative practice which was in effect on such date (other than a provision of this title).

While this language appears somewhat vague, upon examination and review of the Committee Report and legislative history, it becomes quite clear that lodging and per diem reimbursements for long term TDY fall into this category, and are therefore not taxable income. The Conference Report remarks that "the conferees believe that rules for the tax treatment of military benefits should be consolidated and set forth in one statutory provision. This will better enable taxpayers and the IRS to understand and administer the tax rules. . . . The conference agreement excludes from income benefits which were authorized by law on September 9, 1986, and which were excludable from income on such date. Benefits are excludable only to the extent of the amount authorized and excludable on September 9, 1986. . . The conferees understand that the allowances which were authorized on September 9, 1986, and excludable from gross income on such date are limited to the following: . . . temporary lodging in conjunction with certain orders under 37 U.S.C. 404(a) . . ." In turn, 37 U.S.C. 404(a) provides that ". . . a member of a uniformed service is entitled to travel and transportation allowances for travel performed or to be performed under orders . . . when away from his designated post of duty regardless of the length of time he is away from that post . . ."

Therefore, the per diem and reimbursed lodging expenses of military personnel on long term TDY are not taxable as income.

2. Civilians whose actual expenses equal his/her requests for reimbursement

The applicable provision in the Treasury Regulations, at 26 C.F.R. 1.162-17(b)(1), *Reporting and substantiation of certain business expenses of employees*, reads as follows:

(a) Introductory. The purpose of the regulations in this section is to provide rules for the reporting of information on income tax returns by taxpayers who pay or incur ordinary and necessary business expenses in connection with the performance of services as an employee and to furnish guidance as to the type of records which will be useful in compiling such information and in its substantiation, if required. . .

(b) Expenses for which the employee is required to account to his employer--(1) Reimbursements equal to expenses. *The employee need not report on his tax return (either itemized or in total amount) expenses for travel, transportation, entertainment, and similar purposes paid or incurred by him solely for the benefit of his employer for which he is required to account and does account to his employer and which are charged directly or indirectly to the employer (for example, through credit cards) or for which the employee is paid through advances, reimbursements, or otherwise, provided the total amount of such advances, reimbursements, and charges is equal to such expenses.* In such a case the taxpayer need only state in his return that the total of amounts charged directly or indirectly to his employer through credit cards or otherwise and received from the employer as advances or reimbursements did not exceed the ordinary and necessary business expenses paid or incurred by the employee.

This is commonly referred to as the “accountable plan” provision, since the employee “accounts” for the amounts to his/her employer and is then reimbursed for the expenses. To the extent this position conflicts with the JTR, since the United States Treasury/Internal Revenue Service is the federal taxing authority, the opinion expressed in the Code of Federal Regulations as promulgated by the Treasury Department controls, and the amounts are not taxable.

3. Civilians whose reimbursements exceed his/her actual meal expenses (per diem)

26 C.F.R. Section 1.162-17 (b)(2) reads that “[r]eimbursements in excess of expenses. In case the total of amounts charged directly or indirectly to the employer and received from the employer as advances, reimbursements, or otherwise, exceeds the ordinary and necessary business expenses paid or incurred by the employee and the employee is required to and does account to his employer for such expenses, the taxpayer must include such excess in income and state on his return that he has done so.” Therefore, if the employee eats inexpensively in an area that rates a high per diem amount, the employee must declare, as income, amounts that he/she received in excess of what the employee actually spent on his/her meals.

Side Bar: The JTR and IRS agree that reimbursed and reimbursable lodging and per diem expenses in excess of the amount reimbursed by the employer cannot be deducted as business expenses under these circumstances (the over one year TDY) because of the “tax home” provision in 26 U.S.C 162 and IRS Publications 1542, 463 and 535.

Second Issue: Whether the income earned at the remote site is taxable as income by the state in which the work is performed (i.e. the employee becomes a “resident” of the remote state for the purpose of taxation).

Discussion:

Employees have raised concerns about the ability of the remote site of the TDY to tax the income earned at the remote site under the tax laws of the remote state (as though the employee were a bona fide resident of the remote state).

New Jersey is the “example” state for the purpose of this analysis, which considers an individual not from the State of New Jersey, who is domiciled in another state but is present in the State of New Jersey on long term TDY, housed in government-contracted long term housing, performing services for the United States Government, and receiving per diem and lodging reimbursement.

4. Filing a New Jersey Resident Return

Resident taxpayers must file New Jersey returns and pay New Jersey state tax. New Jersey Statute 54A:1-2(m) defines a "Resident taxpayer" as “an individual [w]ho is not domiciled in this State but maintains a permanent place of abode in this State and spends in the aggregate

more than 183 days of the taxable year in this State, unless such individual is in the Armed Forces of the United States." Therefore, military personnel are immediately excluded as a resident for tax purposes. Civilian personnel, since they do not maintain a permanent place of abode in the state, are also not residents for tax purposes.

5. Filing a New Jersey Non-Resident Return

A New Jersey Non-resident must file a New Jersey Non-Resident return and pay taxes on income from sources within New Jersey. New Jersey Statute 54A:5-8 (2001) defines income from sources "within this State for a nonresident individual . . . [as] the income from the categories of gross income . . . to the extent that it is earned, received or acquired from sources within this State. . ." The United States Government is not considered a source within the State of New Jersey, and therefore the non-resident need not file a New Jersey nonresident return.

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